No. 98-1255

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ABEL MARTINEZ-SALAZAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Is a Defendant Entitled to Reversal of His Conviction When He Is Forced to Use a Peremptory Challenge to Remove an Unqualified Juror Whom the District Court Erroneously Failed to Remove for Cause, Where the Defendant Exhausted His Remaining Peremptory Challenges and Where There Is Strong Evidence That He Would Have Used the Erroneously Denied Challenge on Another Juror?

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STATEMENT OF THE CASE

At the Respondent's *voir dire* proceeding, the district court submitted a form to all prospective jurors. J.A. 90-91. On the questionnaire, prospective Juror Gilbert wrote that "I would favor the prosecution." J.A. 131-132.

Later, the district court and counsel questioned Gilbert privately in chambers:

> THE COURT: On your questionnaire, you said in question number 8, the answer: "I would favor the prosecution."

> Is that– are you saying that you would not be able to listen to the evidence, and decide what happened, and follow the instructions of the Court, but would simply vote for a conviction because people are charged with drug crimes?
>
> JUROR/GILBERT: No. I think what I'm saying is all things being equal, I would probably tend to favor the prosecution.

Id.

Juror Gilbert remained adamant about his bias in the face of what the district court called the "important question":

> THE COURT: But, if you were the defendants charged with this crime, and all of the jurors on your case had your background and opinions, do you think you'd get a fair trial?
>
> JUROR/GILBERT: I think that's a difficult question. I don't think I know the answer to that.

J.A. 132.

Responding to a question posed by defense counsel, Juror Gilbert candidly observed that he "would probably be more favorable to the prosecution . . . [because] [y]ou assume people are on trial because they did something wrong." J.A. 133. The district court immediately stepped in:

> THE COURT: [Y]ou heard me out there when I started the trial. That's not the general

> proposition. If it is, it's wrong. It's contrary to our whole system of justice. When people are accused of a crime, there's no presumption---of guilty. The presumption is the other way. That's the way our system.
>
> JUROR/GILBERT: I understand that in theory.

J.A. 133-134.

Gilbert was then excused and said nothing more. He never retreated from these statements; he never stated that he could be fair; and he never subsequently stated that he would follow the district court's instructions to the contrary. J.A. 132-134.

Respondent later challenged Gilbert for cause:

> MR. GARCIA: I would move to excuse him for cause, Your Honor, based on his bias towards prosecutors.
>
> THE COURT: Mr. Kirby.
>
> MR. KIRBY [Prosecutor]: Your Honor, although he did have some opinions, he did indicate to you that he would follow your instructions and apply them accordingly.

J.A. 162-163.

The district court denied the for-cause challenge indicating that the defense could challenge this juror

peremptorily. J.A. 163-164. Defense counsel then reminded the district court that Gilbert indicated "a disregard for Your Honor's instruction on the presumption of innocence." J.A. 163. Trusting the prosecutor's recollection of events, the district court again denied the for-cause challenge finding that Gilbert "came back and said yes that he would follow it and so forth." *Id.* The district court again indicated that if Gilbert was to be excluded from jury service, the defense would have to use a peremptory challenge. *Id.*

Respondent struck Gilbert peremptorily and subsequently exhausted all peremptory challenges. J.A. 180. Later that day, as the courtroom deputy clerk empaneled the petit jury, the parties discovered a petit-juror, Juror-Finck, missing. J.A. 184. Respondent's trial counsel then twice asked the district court to allow an additional peremptory challenge. J.A. 185-186. He observed that "the other advantage of doing that [permitting peremptory challenges]" would be to provide more minorities on the panel. J.A. *Id.* The district court denied the request. *Id.*

Respondent was convicted and he timely appealed his conviction. J.A. 25 & 32. At the court of appeals, the Government affirmatively conceded that Respondent's due-process rights would be violated if he were forced to expend a peremptory challenge to remove an unqualified juror. J.A. 43. The Government steadfastly maintained that the district court had not erred when it refused to strike Gilbert. *Id.*

The court of appeals reversed Respondent's conviction and held the district court erred in denying the for-cause challenge and the denial forced Respondent to exercise a peremptory challenge, violating procedural due-process rights. J.A. 43; United States v. Martinez-Salazar, 146 F.3d 653, 656-

58 (1998); United States' Petition for Certiorari, pp. 9a-15a.

The Government, for the first time, opposed the due-process arguments in a petition for rehearing and suggestion for rehearing en banc. J.A. 43. The court of appeals denied that petition. J.A. 43. The Government filed a Petition for Certiorari, observing that it had "retracted" its early concession regarding due process. United States' Petition for a Writ of Certiorari, p. 5.

SUMMARY OF ARGUMENT

I. The district court violated Respondent's right to the full use of all his peremptory challenges under Rule 24 of the Federal Rules of Criminal Procedure when the Respondent used a peremptory strike to remove an unqualified juror, whom the district court had erroneously failed to remove for cause. In Ross v. Oklahoma, 487 U.S. 81 (1988), this Court addressed Ross' claim that his due-process rights had been violated when the state trial court erroneously denied him a for-cause challenge. The Ross Court found no due-process violation because Ross received all that was due him under state law.

In sharp contrast to Ross, Respondent in this case did not receive what was due him under federal law. He received one less peremptory challenge than he was entitled to under Rule 24 of the Federal Rules of Criminal Procedure, due to the district court's error. The Government now proposes a new rule that would reduce the number of a defendant's peremptory challenges every time the district court erroneously denies a for-cause challenge. The Government asks this Court to judicially impose a requirement forcing the defendant to exercise a peremptory challenge, in order to preserve the right to a fair and impartial jury under the Sixth Amendment. Indeed, the

Government would have this Court take the rule one step further than what is presented in this case and force the defendant to exercise a peremptory challenge in order to preserve his rights to urge a Sixth-Amendment violation on appeal.

The Government's rationale for its proposed rule is unpersuasive. The Government argues that peremptory challenges have never been more than a tool for Sixth-Amendment compliance and that its proposed rule merely extends that principle. Other than *dicta*, the Government offers no meaningful support for this claim. Nor can it. The history and context of peremptory challenges demonstrate that Congress designed peremptory challenges to protect rights congruous with, but distinct from, the Sixth Amendment.

The Government's interpretation of Rule 24 at most raises an ambiguity, which must be resolved under the rule of lenity. Under that rule, the Court must look to everything that could possibly aid in its interpretation and resolve any ambiguity in favor of the accused. See, e.g., Chapman v. United States, 500 U.S. 453, 463 (1991); Smith v. United States, 360 U.S. 1 (1959); Fed. R. Crim. P. 24 (1999).

II. Having found that the district court denied Respondent his full complement of peremptory challenges, reversal is appropriate, whether or not the error is considered to be constitutional or, alternatively, a violation of Rule 24. In any event, the court of appeals' ruling that Respondent's due-process rights were violated is consistent with this Court's previous treatment of procedural due-process issues. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (state's failure to comply with its own procedure violated procedural-due process); Hicks v. Oklahoma, 447 U.S. 343 (1980) (defendant

had procedural due-process rights to expect compliance with a rule of criminal procedure); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979).

Congress has provided for the selection of a jury with the use of peremptory challenges. That jury ultimately determines the imposition of criminal punishment, and Respondent has a substantial and legitimate expectation that the district court will not arbitrarily deny him a jury chosen in accordance with that procedure. While there is no constitutional requirement to provide peremptory challenges, once they are provided, their administration must be fair. Stilson v. United States, 250 U.S. 583 (1919) (no substantive constitutional right to peremptory challenges); cf. Griffin v. Illinois, 351 U.S. 12, 24 (1956) (once the state gives the right to appeal, the government "can't bolt the door shut the door to equal justice.") Here, when the trial court forced the defendant to sacrifice a peremptory challenge to cure the trial court's error, it arbitrarily denied Respondent's Rule 24 right to a peremptory challenge, denying him due process. Cf. Ross, 487 U.S. at 89-91 (compliance with well- settled state law which required use of peremptory challenge to cure trial court error did not arbitrarily deny that right).

III. The court of appeals properly found that the error defied harmless-error review. Martinez-Salazar, *supra* at 658; United States' Petition for Certiorari, p. 8a (February 1999). The court of appeals followed this Court's guidance that held a denial of peremptory challenges falls within the limited class of errors that are not subject harmless-error review. Martinez-Salazar, at Id. (citing United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996) (citing Swain v. Alabama, 380 U.S. 202 (1965) (overruled on other grounds)). Following Swain and its progeny, the court of appeals applied a rule of "automatic reversal." Martinez-

Salazar, 146 F.3d at 658; United States' Petition for Certiorari, p. 14a-15a.

This Court has recently reaffirmed that there is a limited class of cases that defy harmless-error review. Neder v. United States, ___ U.S. ___, 119 S. Ct. 1827, 1833 (1999); see also United States v. Olano, 507 U.S. 725, 735 (1993); Chapman v. California, 386 U.S. 18 (1967). Under Swain and its progeny, the denial of peremptory challenges creates structural error because the harm cannot be measured in any meaningful way. See, e.g., Vasquez v. Hillery, 474 U.S. 254 (1986) (discrimination at Grand Jury); see also McKaskle v. Wiggins, 465 U.S. 168 (1984) (right to self-representation); Strunk v. United States, 412 U.S. 434 (1973) (speedy trial); Chapman v. California, 386 U.S. at 23 ("structural errors" cannot be measured quantitatively, are not subject to harmless-error review and are to be distinguished from trial errors which are amenable to review). Supporting the logic of the court of appeals decision below is the fact that this Court has never searched for harmless error when addressing an abuse of peremptory challenges under the equal-protection clause. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Georgia v. McCollum, 505 U.S. 42 (1992); Powers v. Ohio, 499 U.S. 400 (1991); Batson v. Kentucky, 476 U.S. 79 (1986).

Affirming the court of appeals' decision does not require this Court to find that the error was subject to an "automatic reversal" rule and, for that matter, there is no need to find that the error rose to constitutional dimensions. If this Court were to apply a harmless-error analysis, review may be made under two possible burdens of proof, either an assessment of the government's ability to demonstrate an absence of prejudice or its ability to demonstrate harmlessness beyond a reasonable doubt. Chapman v. California, *supra*. The result is the same

under either standard. Because the error involves peremptory challenges, the only possible measure in assessing harm or prejudice is to analyze whether the jury composition could have changed as a result of the error. Gray v. Mississippi, 481 U.S. 648 (1987).

Recognizing the near impossibility of proving harmlessness in this case, the Government would have this Court rule that the error is harmless if an impartial jury sits. In reality, of course, this is no test at all because, under such a test, a reviewing court would always find the error harmless---there could be no other choice. The error arose precisely because Respondent used his peremptory challenge to cure the trial court error in order to create an impartial jury.

Moreover, the Government's proposed analysis begs the question whose answer must focus on the true harm. The very nature of peremptory challenges permits removal of qualified jurors who otherwise satisfy the Sixth Amendment. Again, the harm lies in a change in jury composition. Gray, *supra*. Any other measurement ignores the unique and important role that peremptory challenges play on the otherwise qualified jury pool. Swain; Annigoni, 96 F.3d at 1144-45; Tucker, *Blackstone's Commentaries*, Book IV, Vol. V, p. 353 (1803) (published by Augustine M. Kelly, New York 1969) (hereinafter "Blackstone's Commentaries").

ARGUMENT

I. THE DISTRICT COURT'S ERRONEOUS DENIAL OF THE FOR-CAUSE CHALLENGE VIOLATED RULE 24.

In Ross v. Oklahoma, this Court addressed a two-prong

attack on the Oklahoma's state court's failure to exclude an unqualified death-penalty juror. Ross, 487 U.S. at 85-91. Like Respondent in this case, Ross exercised a peremptory challenge to remove the unqualified juror and then asserted a violation of his Fifth, Sixth and Fourteenth Amendment Rights. *Id.*

The Ross Court rejected the Sixth-Amendment claim, holding that there is no Sixth-Amendment violation "[s]o long as the jury that sits is impartial." Ross, 487 U.S. at 88. The Court also rejected Ross' due-process claim because Ross's right to a peremptory challenge was limited by Oklahoma state law which expressly directed the defendant to use peremptory challenges to cure trial court errors. Ross, 487 U.S. at 89-91 (citing Ferrell v. State, 475 P.2d 825 (Okla. Crim. App. 1970); Scott v. State, 538 P.2d 1061 (Okla. Crim. App. 1975); McDonald v. State, 15 P.2d 1092 (1932)).

This Court's decision does not answer the question before it today. This Court expressly left open the "broader question whether, in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if defendant uses one or more challenges to remove jurors who should have been excused for cause." Ross, 487 U.S. at 91, n.4.

The Government now claims that Rule 24 of the Federal Rules of Criminal Procedure requires the exercise of a peremptory challenge to cure a trial court's erroneous denial of for-cause challenges. The argument ignores the context and history of the rule. In any event, the argument at best, points out an ambiguity in Rule 24 that must be resolved in Respondent's favor.

A. Rule 24 Does Not Impose a Duty on the Defendant to Cure Trial court Errors.

This Court has stressed, in no uncertain terms, that peremptory challenges are designed, in part, to assure the appearance of fairness. Swain, 380 U.S. at 219 (peremptory challenges satisfy the rule that "justice must satisfy the appearance of justice") (citation omitted). In contrast to the Sixth Amendment, the peremptory-challenge rule provides for a subjectively fair jury. Holland v. Illinois, 493 U.S. 474, 481 (1990) (the parties have the right to "stack" the jury from an otherwise qualified jury pool). Requiring the defendant to cure trial court errors in order to preserve his right to a fair and impartial jury, at the expense of foregoing the right to remove others he perceives as unfair, undermines the core value of peremptory challenges. Such a rule would undeniably provide the very appearance of unfairness that the rules seeks to avoid.

The historical roots of, and this Court's discussion of, peremptory challenges teach that peremptory challenges serve as more than a tool for the Sixth Amendment's guarantee of an objectively fair and impartial jury. Rather, they permit removal of those jurors whom the defendant feels harbor prejudice against him but cannot successfully challenge for cause. Sir William Blackstone, contrasting for-cause challenges with peremptory challenges, observed that the rights to peremptory challenges were "necessary," because a defendant "should have a good opinion of his jury [and] . . . the law wills that he should not be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such dislike." *Blackstones' Commentaries*, at 353. Historically, commentators have long recognized the integral part that peremptory challenges played in jury selection. *Id.*; see also

Hawkins, *A Treatise of the Pleas of the Crown*, Vol. II, Ch. XLIII (1721) (reproduced by Garland Publishing 1978); Pulton, *De Place Regis et Regini*, pp. 201-204 (1609) (reproduced by Garland Publishing 1978); Sr. Matthew Hale, *Historia Placitorum Coronae* ("A History of the Pleas of the Crown"), Vol. II, Ch. XXXV (1736) (reproduced by Professional Books Ltd. 1987).

Sir. William Blackstone's observations about the unique and important role served by peremptory challenges are correct today. If peremptory challenges were but a tool to remove unqualified jurors, there would be no need for peremptory challenges. After all, this Court has held that for-cause challenges adequately protect the defendant's Sixth-Amendment right to a fair trial and the Constitution requires no more. See, e.g, Stilson, *supra*.

In no instance does federal law, by rule or procedure, require that a defendant affirmatively forfeit such an important right in order to preserve a fundamental constitutional right. In the abstract, the idea is inconceivable. No rule should force a defendant to make that sacrifice because to do so offends traditional notions of fair play and justice. See, e.g., Ross, 487 U.S. at 97, (Marshall, J., dissenting) (citing United States v. Jackson, 390 U.S. 570 (1968) (striking statute that made death penalty available only to those who exercised their right to jury trial); Brooks v. Tennessee, 406 U.S. 605 (1972) (striking statute that required a criminal defendant to testify first, if he wished to testify in his own behalf)).

That peremptory challenges serve a high purpose,

distinct from for cause challenges, is beyond refute.[1] This Court in Swain further explained:

> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. "For it is as Blackstone stays, an arbitrary and capricious right; and it must be exercised with full freedom or it fails of its full purpose."
>
> . . . .
>
> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for real or imagined partiality that is less easily designated or demonstrable.

Swain, 380 U.S. at 219-220 (citations omitted); Holland, 493 U.S. at 484 (peremptory challenges are a "means of excluding extremes of partiality on both sides") (citing Swain, *supra).*

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[1] Scholars agree. They too have observed that peremptory challenges are more than a tool to ensure Sixth Amendment compliance: "The peremptory challenge serves important functions: it (i) teaches the litigant and through him the community, that the jury is a good and proper mode for deciding matters and that its decision should be followed because in a real sense it belongs to the litigant' because 'he chose it' . . . [and] (iii) serves as a shield for the exercising of the challenge for cause." W. LaFave & A. Israel, *Criminal Procedure*, § 22.3, p. 978 (2nd ed.) (1992) (citations omitted) (hereinafter "Criminal Procedure").

The number of rights to peremptory challenges available under Rule 24 also reveals that Congress intended them to serve a purpose beyond the empaneling of a fair and impartial jury. The Rule provides the defendant an increasing number of peremptory challenges as the seriousness of the offense increases. Specifically, Rule 24 affords the defendant 20 peremptory challenges "if the charged offense is punishable by death" and 10 peremptory challenges "[i]f the offense is punishable by imprisonment of more than one year" and just 3 peremptory challenges if the offense is a misdemeanor. Unlike the number of peremptory challenges, the number of trial jurors to be selected in a criminal trial does not turn on the offense charged. Fed. R. Crim. P. 23 (1999). Obviously, Congress recognized that peremptory challenges are more than a vehicle that drives toward Sixth- Amendment compliance. Were that the case, the number peremptory challenges would remain the same regardless of the offense charged because the number of trial jurors is static.

Of course, the logical reason for the graduated number of peremptory challenges is the increased need for the subjective perception of fairness as criminal exposure rises. As the seriousness of the offense rises, public attention rises, and with it, the increased need for public and personal confidence in the fairness of the trial. See, e.g., Georgia v. McCollum, 505 U.S. 42, 57 (1992) ("The Court has recognized that 'the role of litigants in determining jury composition provides one reason for wide acceptance of the jury system and of its verdicts.'") (citation omitted); Powers v. Ohio, 499 U.S. at 413 ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."); Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975) (acknowledging a need for public confidence in the

criminal justice system); Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (same). Similarly, scholars have recognized that peremptory challenges instill confidence in the criminal justice system. See, e.g., Babcock, *Voir Dire Preserving Its Wonderful Power*, 27 Stan. L. Rev. 545, 551 (1975); Gobert, *The Peremptory Challenge- An Obituary*, 1989 Crim. L. Rev. 528, 552 (1989). In this regard, this Court's language in Swain is worth repeating: " [T]he peremptory satisfies the rule that to perform its high function in the best way 'justice must satisfy the appearance of justice.'" 380 U.S. at 219.

B. The Rule of Lenity Requires Interpretation of Rule 24 in Favor of Respondent.

At most, Rule 24 is ambiguous on the question presented to the Court and must be interpreted in favor of the accused under the rule of lenity. The rule of lenity is to be applied "only after seizing everything from which aid can be derived." Reno v. Koray, 515 U.S. 50, 64-65 (1995) (quoting Moskal v. United States, 498 U.S. 103 (1990)) (interpreting whether pretrial detention includes time spent at a half-way house; rejecting the rule of lenity because congressional intent resolved the issue). This Court has held that there must be a "grievous ambiguity or uncertainty in the language and structure of the Act" before applying the rule. Chapman v United States, 500 U.S. at 463 (1991); see also Ratzlaf v. United States, 510 U.S. 135, 148 (1994) (observing that it would resolve any doubts about an ambiguous money-structuring statute's scienter requirement in favor of the accused). This Court has applied the rule of lenity to interpret the Federal Rules of Criminal Procedure as well. Smith, *supra* (interpreting Rule 7 of the Federal Rules of Criminal Procedure under the rule of lenity).

Congress passed the first statute authorizing peremptory challenges in 1790. The statute said nothing about imposing a duty on the defendant to correct trial court errors. 1 Stat. 119 (1790) (providing peremptory challenges in capital cases). Upon subsequent revisions, Congress again stated nothing about the issue raised before this Court. 17 Stat. 282 (1872) (providing peremptory challenges in non-capital cases); Fed. R. Crim. P. 24 (1999).

Similarly, the text of Rule 24 gives no hint as to whether the defendant must cure trial court error. Likewise, the legislative history appears to be silent on the mater. Mark S. Rhodes, *Orfield's Criminal Procedure under the Federal Rules*, §§ 24:2-24:4 (setting forth history of rule) (2nd ed.) (1986) (legislative history of Rule 24 is silent). While this Court has stated in passing over the years, that the purpose of peremptory challenges is to ensure an empaneling of a jury that complies with the Sixth Amendment, the Court has never offered any substantive analysis, never considered historical evidence to the contrary and never cited to legislative history to support the proposition that Congress intended that result. The Government's citation to *dicta* is unhelpful.[2] On the other

[2] As noted by the Government in its opening brief, this Court has held that "[i]t is to the holdings of our cases, rather than our *dicta*, that we must attend." Bennis v. Michigan, 516 U.S. 442, 450-51 (1996). The Government's citation to J.E.B., 511 U.S. at 137, n.7 is one such example. Likewise, where this Court used language describing the peremptory challenge it has done so casually, apparently never intending to hold that federal peremptory challenges serve no other purpose. For example, the Ross Court, using the language now favored by the Government, cited early decisions which examined peremptory challenges under state or territorial statutes, but did not address procedural-due-process issues or rule on the purpose of peremptory challenges. Ross, 487 U.S. at 88 (citing Hopt v. Utah, 120 U.S. 430, 436 (1887) (applying Utah territorial statute); Spies v. Illinois, 123 U.S. 131 (1887) (applying Illinois statute)). Similarly the Government's citation to this Court's decision in Fraizer v. United States, 335 U.S. 497, 505 (1949) is misplaced.

hand, this Court in Swain provided a tome supporting its proposition that peremptory challenges have a salutary effect on the appearance of justice. Swain, 380 U.S. at 202-220; Holland, 493 U.S. at 481-483.[3]

There is no support for an interpretation that Rule 24 requires that the defendant correct trial court errors. Such a finding denies the strong and unequivocal evidence to the contrary and the rule of lenity forbids it.

In Fraizer, the defendant challenged the composition of his jury, after his peremptory challenges helped create that very jury. The Court observed that the right to these challenges "of course, [is] to be exercised in the party's sole discretion and was so exercised here. . . . But the right is given in aid in the party's interest to secure a fair and impartial jury, not for creating ground to claim partiality which but for its exercise would not exist. It does not follow that by using the right as he pleases, he obtains the further right to repudiate the consequences of his own choice." *Id.* Indeed, the Court also observed that "the privilege affords protection *in addition to constitutional guarantees* . . . ." *Id.* at n. 11 (emphasis added).

[3] Even if one were to believe that peremptory challenges served only to guard the Sixth- Amendment right to a fair trial, an infringement on this right strikes at the very heart of the Sixth Amendment. Peremptory challenges may be used to remove those who harbor disqualifying prejudices otherwise insulated from an objective review under the Sixth Amendment. "A person's biases are best interpreted from the subjective perspective of the targeted party. . . The peremptory challenge by definition anticipates this dilemma." Note, *The Discriminationtory Effect of the "Color-Blind" Jury: Georgia v. McCollum, 112 S. Ct. 2348 (1992)*, 16 Ham. L. Rev. 975, 996 (1993). The forfeit of a peremptory risks a Sixth-Amendment violation even if all for-cause challenges were properly granted. *Id*, cf. Holland, 493 U.S. at 481-82.

C. The Government Proposes an Illegitimate Substantive Limitation on Peremptory Challenges.

The Government attempts to link this Court's earlier decisions that permit the imposition of administrative-procedural rules on peremptory challenges with its proposed substantive "rule" that would require defendants to forfeit their own peremptory challenges in order to cure trial court error. The Government cites to cases where the trial court applied statutory rules that administered peremptory challenges, but offers no support for its proposed rule that substantively reduces the number of challenges. Brief for the United States, pp. 18-19 (citing United States v. Marchant, 25 U.S. 480, 482 (1827) (one defendant's striking of juror acceptable to other permissible); Stilson, *supra* (statutory requirement that the defendant share peremptory challenges among co-defendants acceptable); Pointer v. United States, 151 U.S. 396, 410-412 (1894)(permitting the trial court to force simultaneous challenges even though the Government may strike the same juror noting the statute was not violated); St. Clair v. United States, 154 U.S. 134 (1894) (approving a statutory process by which peremptory challenges were exercised immediately following for-cause challenges)). In that regard, the Government easily dismisses cases from the same era reversing substantive limitations on the number of peremptory challenges. See, e.g., Harrison v. United States, 163 U.S. 140 (1896) (reversing conviction where defendant received fewer peremptory challenges than permitted by statute). That, of course, is the issue facing this Court.

Thus, the Government's argument misses the point of

these cases. In Marchant, the defendant may have had an acceptable juror removed, but there was no argument that an unacceptable one remained. The Court expressly observed that the peremptory challenge has long been held to be a right "to reject jurors" and that right was not violated by the administrative process. Marchant, 25 U.S. at 479.

In Pointer, the defendant de-selected his unacceptable jurors--- furthering the very purpose of peremptory challenges, spoken about in Marchant. The Court expressly noted that the defendant received the number of peremptory challenges permitted by law. Pointer, 151 U.S. at 411. Similarly, in St. Clair, *supra*, the only issue was in administering the order of challenges, as provided for under the statute, and there was no allegation that the defendant received anything less than what the rule permitting peremptory challenges provided. St. Clair, 154 U.S. at 147.

In Stilson, the Court rejected defendant's claim that the statutory requirement of sharing peremptory challenges violated his Sixth-Amendment right to a fair and impartial jury. There was no claim in Stilson that the defendant was procedurally denied anything that was otherwise due him under rule or statute. Stilson, 250 U.S. at 587. In fact, there could be no such claim because, like St. Clair, the statute provided for that very results attained. *Id.*

Ultimately, the Government overlooks that it proposed a substantive limitation, on peremptory challenges, not provided for by Rule 24. Stilson, Marchant, Pointer and St. Clair addressed the administration of peremptory challenges, most of which were imposed by statute. In contrast, the Government seeks a judicially imposed, arbitrary deprivation of peremptory challenges, to cure erroneous trial court denials of for-cause

challenges. This Court has only reluctantly applied substantive limitations on the right to freely exercise peremptory challenges and has only done so where the free exercise of the peremptory challenge violates the equal-protection clause. Batson, *supra*; Powers, *supra*; McCollum, *supra*; J.E.B., *supra*. The Court recently refused to substantively limit peremptory challenges under the Sixth Amendment. Holland, *supra*. This Court has also held that the trial court's power to administer criminal rules of procedure is limited and the administration cannot conflict substantively with the Rule of Procedure. Carlisle v. United States, 517 U.S. 416 (1996) (court may not grant untimely judgment of acquittal under supervisory powers); cf. Jones v. United States, ___ U.S. ___, 119 S. Ct. 2090, 2099 (1999) (refusing to invoke supervisory powers to impose jury instruction under Federal Death Penalty Act because "Congress chose not to require such an instruction").

Additionally, the Government's proposed substantive rule is fraught with risk because it converts a substantial right with a remedy into one without a remedy. The proposed rule invites the prosecutor to routinely oppose a defendant's for-cause challenges, knowing that the defendant will bear the burden of the trial court error.

The Government's proposed rule also relieves the district court of its duty to carefully scrutinize such challenges. In fact, the rule gives the district court the incentive to err on the side of denying for-cause challenges.[4] Annigoni, 96 F.3d at 1146.

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[4] In addition to the court's incentive to streamline the process, the district court must always maintain a proper number of potential jurors or risk a violation of the Jury Selection Act. 28 U.S.C. § 1866 (1994); see also United States v. Kennedy, 548 F.2d 608 (5th Cir.), cert. denied, 434 U.S. 865 (1977).

A district court's decision of for-cause challenges is already reviewed under a very liberal abuse-of-discretion standard, Wainright v. Witt, 469 U.S. 412, 424 (1985), and there is no need to provide further appellate insulation. Under the Government's proposed rule, the district court must make at least 11 errors, each subsequently cured by the defendant, before its decision may be reviewed. It is only at that point, that the defendant can no longer guard against a Sixth-Amendment violation. Ross, *supra*.

Finally, the proposed rule diverts the district court's attention away from the important role of jury selection at the trial. That process has deservedly received much attention because of the gamesmanship. Batson, *supra*. Appellate insulation will permit overzealousness to continue, but this time, from a continuous flow of objections to legitimate for-cause challenges made with the comfort of knowing that the effect of mistakes are to be borne by the defendant. If anyone questions whether gamesmanship can be an issue, one need only look at Batson and its progeny. Adversarial overzealousness is a real risk and cannot be so easily dismissed. Cf. Ross, 487 U.S. at 92, n.5 (district court's deliberate misapplication of law in order to force defendant to use peremptory challenge raises different concerns).[5]

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[5] In this case, the district court apparently relied on the prosecutor's characterization of Juror Gilbert's colloquy, finding that Gilbert had "come back and said yes he would follow it and so forth." J.A. 163; see also Martinez-Salazar, 146 F.3d at 656; United States' Petition for a Writ of Certiorari, p. 8a (February 1999) (observing that the prosecutor's remarks were unsupported by the record). But, both defense counsel had insisted that Gilbert had demonstrated bias. J.A. 162-163. While not argued here, in other cases, an inference can be drawn that the prosecutor acted deliberately to force a defendant to use peremptory strikes. The specter of such conduct demonstrates why it is so dangerous to insulate for-cause challenges from appellate review.

In the final analysis, the district court denied a for-cause challenge and forced Respondent to sacrifice a peremptory challenge to save himself from an unfair and impartial jury. There is and was no rule, whose interpretation remotely suggests that Respondent should bear the burden of that error. Neither Rule 24 nor its history suggests that Congress ever intended that result.

II. THE SUBSTANTIAL IMPAIRMENT OF PEREMPTORY CHALLENGES VIOLATED DUE PROCESS.

Respondent's due-process rights are directly implicated when the district court abuses its discretion and arbitrarily denies a for-cause challenge, forcing the defendant to exercise a peremptory challenge in order to remove an unqualified juror.[6] This Court observed in Ross that the state trial court's erroneous denial of a for-cause challenge, resulting in one fewer peremptory challenge, was not arbitrary because state law required him to cure trial court errors. Cf. Ross, 487 U.S. 88-91.

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[6] A procedural due-process violation only occurs upon a substantial impairment of an important procedural right. See, e.g. Hicks, *supra*. Additionally, there must be an arbitrary denial of the right. *Id*. Moreover, the states, like Oklahoma, are free to limit the right in the way proposed by the Government. See Ross, 487 U.S. at 81. Accordingly, the Government's parade of horribles raised in habeas corpus, ought to be disregarded. Moreover, where peremptory challenges are concerned, a substantial impairment requires the defendant to have exhausted his peremptory challenges demonstrating that a challenge was in fact denied. See, e.g. United States v. Love, 134 F.3d 595 (4th Cir.), cert. denied, ___ U.S. ___, 118 S. Ct. 2332 (1998); cf. McDonough Power Equipment, 464 U.S. 548, 555 (1984) (civil case) (directing trial court on remand that error with respect potential juror misconduct during *voir dire* is to be analyzed only in terms of whether it had an effect on for-cause challenges).

As previously noted, federal law has never imposed on the defendant the duty of forfeiting peremptory challenges to correct trial court errors. Federal peremptory challenges, in the United States, have been in existence for approximately 209 years. 1 Stat. 119 (1790). While Congress has changed the number of challenges available and has incorporated the right to peremptory challenges into the Federal Rules of Criminal Procedure, it has never considered or imposed such a rule. The district court's arbitrary denial of a peremptory challenge, otherwise guaranteed by Congress, therefore denied Respondent due process.

The Government goes to great lengths to attempt to demonstrate that due-process rights do not attach, in an effort to lower the standard of harmless error review. Brief for the United States, pp. 22-25; Olano, *supra*; Chapman v. California, *supra*. The Government however waived this argument by conceding the issue at the court of appeals. See Argument § III(B), *infra*. Nonetheless, the correct analysis is far more straightforward and demonstrates that a violation of Rule 24 is a procedural due-process violation.

The due-process clause applies where liberty or property interests are at stake and ". . . when a person [has] more than an abstract need or desire for an [important procedural right]. He must have more than a unilateral expectation of it. He must have a legitimate claim of entitlement to it" and the right must not be denied arbitrarily. Greenholtz, *supra*; Logan, *supra*; see also Hicks, *supra*; cf. Ross, 487 U.S. at 89-90 (observing that judicial compliance with settled Oklahoma law was not arbitrary); cf. Griffin, 351 U.S. at 24 (once the state gives the right to appeal, the government "can't bolt the door shut the door to equal justice.").

This Court's decision in Logan illustrates the due-process principle involved because it persuasively demonstrates that a substantial violation of an important procedural rule violates due process. In Logan, the plaintiff sued under Illinois' Fair Employment Practices Act ("FEPA") for an employment-discrimination claim. Logan, 455 U.S. at 422. After a local administrator erroneously failed to set a hearing in a timely manner, his FEPA claim was statutorily cut off. *Id.* This Court held that the plaintiff had more than an "abstract desire or interest" in FEPA's procedure but had a procedural due-process "right guaranteed by the State." *Id.* at 431.

Likewise, Respondent has more than an abstract "desire"for adherence to the procedural mechanisms attendant with jury selection. Like Logan, Respondent arbitrarily lost an important right because of governmental error and he had a legitimate expectation, grounded in statute, to that important right. Specifically, Rule 24 provided for the loss of his liberty interest only after a trial where the jury was selected through the use of 10 peremptory challenges. Fed. R. Crim. P. 24 (1993). There was no established procedure to the contrary. The right is "essential." Swain, 380 U.S. at 220; see generally Holland, 493 U.S. at 481-83. The district court's erroneous denial of the for-cause challenge, forcing the Respondent to forfeit his rights under Rule 24, is no less arbitrary and no less important than those rights addressed in Logan. Cf. Ross at *Id.* Indeed, given the liberty interest at stake and the crucial role peremptory challenges play, the procedural right is more important.

Even if due process is implicated only where the fundamental fairness of the trial is infected, as suggested by the government, United States v. Lane, 474 U.S. 438, n.8 (1985), a denial of a peremptory challenge meets the mark. This Court, long ago, recognized that peremptory challenges are critical and

"that the fairness of trial by jury requires no less." Swain, 380 U.S. at 221.

That peremptory challenges are essential to a fair trial is no less true today than it was in 1965 or 1790. They provide the defendant with the subjective fairness because he "owns" the jury and must live with the jury's verdict. *Criminal Procedure*, at *id.* Peremptory challenges ferret out prejudices otherwise shielded through the objective test employed by the Sixth Amendment. *Id.* They also provide the defendant and the community with the necessary confidence in the verdict. *Id.*

In the end, peremptory challenges have enjoyed and continue to enjoy a great respect due to their "venerable" tradition and the important role they play in giving a defendant a fair trial. Holland, 493 U.S. at 481. Peremptory challenges were, after all, enacted by the same Congress that passed the Bill of Rights, and this Court recently offered even more praise, noting that given the long history of peremptory challenges, the "term constitutional phrase 'impartial jury' must surely take its content from this unbroken tradition.'" Holland, at *id.* Whether analyzed under Logan or Lane, the arbitrary and substantial denial of Respondent's peremptory challenge constituted a deprivation of his due-process rights.

III. THE HARMLESS-ERROR RULE DOES NOT APPLY.

This Court has observed that most constitutional errors are subject to a harmless-error analysis. Neder v. United States, 119 S. Ct. at 1833. In Neder, this Court also reiterated the "strong presumption" that, if the defendant had counsel and a "fairly selected, impartial jury" the error is subject to a harmless-error analysis. *Id.* at 1833-34.

Structural errors present a different, albeit limited, class of cases. *Id.* (citing Johnson v. United States, 520 U.S. 461, 468 (1997)). These errors "defy harmless-error" review and are subject to automatic reversal. Neder, 119 S. Ct. at *id.* While the jurisprudence does not support an absolute rule dividing structural from trial errors, the rule is useful. Annigoni, 96 F.3d at 1143 (citing Brecht v. Abrahamson, 507 U.S. 619, 629 (1993)) (observing that this Court has described the divergence as a "spectrum"). A structural error ordinarily affects "the framework in which the trial proceeds rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 309 (1991).

Trial errors, on the other hand, are to be reversed when the government cannot prove an absence of prejudice. Chapman v. California, *supra.* This standard, of course, will apply here, should the Court determine that the violation of Rule 24 did not violate Respondent's due-process rights. *Id.* In other words, violation of Rule 24 alone provides a basis for reversal where, as here, the government cannot prove the absence of prejudice.

In any event, the question of whether the harmless-error doctrine applies, and under what burden, does not control the outcome in this case. Whether deemed "structural error," "constitutional error" or simply a violation of Rule 24, this Court should affirm the court of appeals because the Government cannot meet its burden. Each of the circumstances is now addressed in turn.

A. The Substantial Impairment of A Peremptory Challenge Defies Harmless-Error Review.

A denial of peremptory challenges fits squarely within the doctrine of structural error because its defect lies in the trial framework not in what happens during the trial. Rule 24 provides the defendant with the framework for jury selection. Combined with for-cause challenges, the peremptory-challenges work in concert to produce a "fairly selected" jury. Neder, 119 S. Ct. at 1834. They provide a defendant with an objectively and subjectively fair and impartial jury. The peremptory challenge is a "structural" tool because an erroneous deprivation "may [not] be quantitatively assessed in the context of other evidence presented." Brecht, 507 U.S. at 629.

This Court long ago lauded the essential nature of peremptory challenges in jury selection, observing the important role it played in structuring the jury:

> The persistence of peremptory challenges and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. Lewis v. United States, 146 U.S. 370, 376, 36 L.Ed. 1011, 1014, 13 S. Ct. 136. Although 'there is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges,' Stilson v. United States, 250 U.S. 583, 586, 63 L.Ed 1154, 1156, 40 S. Ct. 28, nonetheless the challenge is 'one of the most important of the rights secured to the accused,'

> Pointer v. United States, 151 U.S. 396, 408, 38 L.Ed 208, 214, 14 S. Ct. 410. The denial or impairment of the right is reversible error without a showing of prejudice, Lewis v. United States, 146 U.S. 370, 36 L.Ed. 1011, 13 S. Ct. 136; Harrison v. United States, 163 U.S. 140, 41 L.Ed. 104, 16 S. Ct. 961; cf. Gulf, Colorado & Santa Fe R. Co. v. Shane, 157 U.S. 348, 39 L.Ed 727, 15 S. Ct. 641.

Swain, 380 U.S. at 219 (citations original). While this Court acknowledged that it has ruled otherwise, this Court recently observed that the right to peremptory challenges is so vital that one could plausibly argue that the Constitution requires them. Holland, 493 U.S. at 482.

Under Swain and its progeny, the fundamental importance that peremptory challenges play in the trial process and the automatic reversibility that flows from the substantial impairment of peremptory challenges, appears beyond reproach. The Government, of course, disagrees and argues that the analysis set forth in this Court's decision in United States v. Lane, *supra*, changes Swain. The Government is, however, incorrect because Lane in fact strengthens the premise that Swain has continuing vitality.

In Lane, this Court addressed a claim of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure. The Court applied a harmless-error analysis notwithstanding earlier decisions that held misjoinder to be reversible per se.

The Lane Court's decision rested on two premises. First, it relied on earlier decisions that suggested that the harmless-error doctrine did in fact apply to cases presenting issues similar

to misjoinder. Lane, 474 U.S. at 446-448 ("A plain reading of these cases shows they dictate our holding"). The Court reasoned that application of the harmless-error doctrine to analogous cases permitted an extension to misjoinder. *Id.*

Second, the Court observed that Rule 52 and Rule 8 of the Federal Rules of Criminal procedure did not exist when decisions involving the per se-reversal rule existed. Lane, 474 U.S. at 444. The Court concluded that the subsequent enactment of those rules, combined with Congressional enactment of 28 U.S.C. § 2111 (addressing harmless error) required a different result. *Id.*

Addressing the continuing vitality of Swain, this Court is faced with factors directly countervailing those present in Lane. This Court has consistently cited Swain as its starting point for peremptory-challenge analysis, noting the important role of peremptory challenges in fair-jury selection . See, e.g., Batson, 476 U.S. at 84 & 98; Holland, 493 U.S. at 480-82; Powers, 499 U.S. at 404; McCollum, 505 U.S. at 47 (starting point). Notably, the Court has never applied a harmless-error analysis when addressing error associated with the exercise of peremptory challenges. *Id.*[7]

Moreover, both Rule 24 and Rule 52 existed at the time

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[7] This Court's decision in Powers underscores the inappropriateness of a harmless-error analysis. In Powers this Court held that defendant need not be of the same race than a juror excluded because of race, in order to allege an equal-protection violation. (There was no allegation that Mr. Powers' Sixth amendment rights were violated because a fair and impartial jury sat and the Sixth Amendment required no more. Holland, *supra*.) Still, this Court reversed the conviction, observing that when there are legitimate doubts that the jury has been chosen by proper means, the composition of the trier of fact is called in question and "the irregularity may pervade all the proceedings that follow." Powers, 499 U.S. at 412.

this Court decided Swain. Indeed, Rule 52 has remained largely unchanged since its adoption in 1944. Unlike the circumstances in Lane, the Swain Court had Rule 52 before it, when it re-enunciated that principle that the erroneous impairment of peremptory challenges are reversible per se.[8] This Court's decision in Lane, *supra*, therefore, adds no support to the Government's argument. Lane, in fact, undermines it.[9]

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[8] It should have surprised no one that the courts held peremptory challenges in the highest regard. Swain, 380 U.S. at 212-221 (describing its widespread and long-held acceptance). The Swain Court's language, endorsing the protection of peremptory challenges from harmless-error review, was hardly earth-breaking.

If this Court's perennial endorsement of peremptory challenges and its repeated language that its impairment required automatic reversal were objectionable to Congress, Congress could have spoken and had much opportunity to do so. Congress amended Rule 24 in 1966 and 1987. Congress also addressed Rule 24 in 1997, but did not amend it. Fed. R. Crim. P. 24, *Advisory Committee Notes*. In the intervening 39 years since Swain, Congress chose not to amend Rule 24.

That Congress addressed Rule 24 is important in its proper interpretation. Congress is presumed to be aware of judicial interpretation when it re-enacts a statute without change. See, e.g., United States v. Mitchell, 39 F.3d 465, 469(4th Cir.), cert. denied, 515 U.S. 1142 (1995). This Court spoke to the issue of automatic reversal and Congress did not see fit to change it when it subsequently amended Rule 24. This Court should not do so now.

[9] Most of the federal courts that have directly addressed the issue have concluded that where substantial impairment of the right to peremptory challenges occurs, it is not subject to harmless-error review. United States v. Serino, 163 F.3d 91 (1st Cir. 1998); United States v. Taylor, 92 F.3d 1313 (2nd Cir.), cert. denied, 519 U.S. 1093 (1997); Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir.), cert. denied 516 U.S. 1145 (1996); Knox v. Collins, 928 F.2d 657 (5th Cir. 1991); United States v. Underwood, 122 F.3d 389 (7th Cir.), cert. denied, 118 S. Ct. 2341 (1998); Annigoni, *supra*. There is *dicta* to the contrary. See, e.g., Brief for the Respondent in Opposition to the United States' Petition for Certiorari, p. 14.

B. If The Harmless-Error Doctrine Applies, the Government Cannot Meet Its Burden.

Assuming *arguendo* that harmless error applies, if this is a violation of due process, the Government must prove harmlessness, beyond a reasonable doubt. Chapman v. California, *supra*. If the error is non-constitutional, the government must prove that harm was not prejudicial. *Id.*

Under either standard, the Government cannot meet its burden.

1. The Government Must Prove Harmlessness Beyond a Reasonable Doubt.

If the substantial impairment of peremptory challenges is a constitutional violation, the Government must prove harmlessness beyond a reasonable doubt. Chapman v. California, *supra*; see also Argument, II *supra*. The Government's argument to the contrary ignores that it has already affirmatively conceded and thereby waived this issue.

On April 24, 1995, the court of appeals ordered that the parties file supplemental briefs on the issue presented to this Court. J.A. 38. On June 29, 1995, the Government filed its supplemental brief and conceded that the denial of a peremptory challenge to which defendant was entitled would violate due process where defendant was forced to exercise the challenge against a juror who should have been excused for cause. J.A.

39; United States' Petition for Certiorari, p.5, n.1 (citing United States' Supplemental Brief, pp. 9-12). The Government reasserted the concession at oral argument on the issue before the court of appeals but retracted it after it the court of appeals issued its decision. Martinez-Salazar, 146 F.3d at n.3; United States' Petition for a Writ of Certiorari, p. 9a.

This Court will not ordinarily consider newly raised issues. Cf. Jones, 119 S. Ct. at 2117-2118 (Ginsburg, J., dissenting) (citing Roberts v. Galen of Va., Inc., 525 U.S. 249, 253 (1999) (per curiam) (addressing whether Government waived issue in briefing process before the Court). There is no good reason why the Government should be allowed to assert an argument that it conceded below. The Government did not contest and therefore did not brief the due-process issue before the court of appeals. The court of appeals did not have the full benefit of the adversarial process. Moreover, it should be clear that the argument is not a "predicate to an intelligent resolution of the question presented." *Id.* While the Government now disputes the due-process issue, its previous position reflects that its resolution is unnecessary in this case.

Still, other factors warrant this Court's refusal to consider the waived issue. First, the due-process issue is not one of national importance that often recurs. In fact, the controversy between Respondent and the Government, raising due-process error, is one that infrequently occurs, and when it does, there is general uniformity in the decision. See n. 9, *supra*. So rare are these cases, the Government and the Respondent have appeared to identify all federal cases and their number is quite low. Moreover, it is not likely to come up often because the liberal standard-of-review accorded the trial courts when reviewing for-cause challenges filters out most of the due-process issues.

The Government's concession also raises a parity issue. Where defendants' rights are involved, this Court recently observed that "[n]o procedural principle is more familiar to this Court than that a 'constitutional right' *or a right of any sort*, may be forfeited . . . ." Olano, 507 U.S. at 731 (emphasis added). But this is not mere forfeiture. It is waiver and "[w]aiver is different from forfeiture." *Id.* Whereas forfeiture is the failure to make a timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Id.* at 733. The latter almost certainly extinguishes the right. *Id.*

The Government gave up the right to press the issue. The Government should be held to no lower standard than a defendant. For that reason, this Court should hold that the Government's due-process argument is waived and the appropriate consequences should follow, namely that it must prove harmlessness beyond a reasonable doubt. Olano, *supra*.

2. *Under Any Standard, the Government Cannot Prove Harmlessness.*

Under any measure of harmlessness, the government cannot meet its burden under Rule 52. Harmless error, when measuring a denial of peremptory challenges, requires some attempt to assess the compositional change of the jury resulting from the error.

Instead, the Government argues that its burden ought to be satisfied when it demonstrates that a fair and impartial jury sat. See Brief for the United States, pp. 28-32. The argument misapplies Sixth amendment doctrine to the issue. In fact, the Government's proposed measure of harmlessness mirrors the Sixth amendment language in Ross. But, this Court in Ross

never purported to provide a standard by which harmlessness may be measured. The Court did not cite Rule 52 and did not refer to Title 28, section 2111. Both are essential elements of a decision addressing harmless error. Chapman v. California, *supra*.

Instead, this Court in Ross held, very logically, that under the Sixth Amendment "no violation of the petitioner's right to an impartial jury occurred" so long as an impartial jury sits. Ross, 487 U.S. at 88. The holding is about the nature of the error not about the nature of the harm. It is not a rule that measures harmless error at all.

Harm must be measured in terms of the procedural right violated. Peremptory challenges, by their very nature, must be exercised on an otherwise qualified jury panel. What then is the harm? A substantial impairment of a peremptory challenge harms the defendant when it changes the composition of that panel. This Court's holding in Gray v. Mississippi, *supra*, is instructive. In Gray, this Court addressed whether the trial court's erroneous exclusion of a qualified death-penalty juror required automatic reversal under Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainright v. Witt, 469 U.S. 412 (1985) (collectively referred to as the "Witherspoon-Witt" exclusion). Gray, 481 U.S. at 650-658. Under the Witherspoon-Witt exclusion, jurors opposed to the death penalty may not be stricken for cause simply because they oppose it, but they may be peremptorily stricken by the prosecution nonetheless. Gray, *supra*. The removal of these jurors for cause, violates the defendant's Sixth amendment right to a fair-cross section of the community. *Id.*

In Gray, the trial court erroneously denied several for-

cause challenges made on behalf of the State, and the State exhausted its peremptory challenges. Gray, 481 U.S. at 650-658. Subsequently, the State asked for an additional peremptory challenge to strike an otherwise death-qualified juror because she opposed the death penalty. *Id.* Rather than permit the State any additional peremptory challenges, as the State had requested, the trial court struck the qualified juror, violating Witherspoon-Witt. *Id.*

This Court rejected the State's argument that the error was harmless. This Court reversed despite the fact that the State had asked for the additional peremptory challenge to strike the very juror in question.

The Court properly refused to attempt to reconstruct the jury-selection process in an attempt to measure the harm. "[T]he relevant inquiry," noted this Court in Gray, "is whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error." Gray, 481 U.S. at 665 (citations omitted). In the context of the peremptory challenges, there can be no other way.[10] This Court explained why:

> Due to the nature of trial counsel's on-the-spot decisionmaking during jury selection, the

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[10] In Ross, this Court, while addressing the Sixth Amendment claim, limited the holding in Gray to the unique facts before it, namely the measure of harm that attends the exclusion of a death-qualified juror. But, this Court in Ross never reached the "harm" issue associated with the alleged due process violation because no violation was found. Ross, 487 U.S. at 88. Accordingly, the Court's limiting language in Gray is best understood as rejecting the Gray measurement under the Sixth Amendment, when the defendant admittedly received a fair and impartial jury. *Id.* A return to the Gray measurement of harm is appropriate because the erroneous denial of a peremptory challenge, whether called a due-process violation or a statutory violation, precluded the seating of the next qualified juror on the jury list.

> number of peremptory challenges remaining for counsel's use clearly affects the exercise of those challenges. A prosecutor with few peremptory challenges in hand may be willing to accept certain jurors whom he would not accept given a larger reserve of peremptories . . . The nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror is harmless.

Gray, 481 U.S. at 667 (emphasis added).

Were it any other way, appellate courts would be left the daunting, if not impossible, task of reconstructing a lawyer's likely or unlikely use of peremptory challenges on a particular juror. The exercise of peremptory challenges, as this Court noted in Gray, depends on a host of intangibles, including how many peremptory challenges are left and certainly on what jurors have survived for-cause challenges. Moreover, because peremptory challenges necessarily involve the de-selection of qualified jurors, appellate courts attempting to measure harm would need to embark upon an analysis of the effect of excluding a juror who never sat. Traditional harmless-error analysis is therefore impossible. The Ninth Circuit Court of Appeals was absolutely correct when it stated that "[t]o apply harmless-error analysis in this context would be to misapprehend the very nature of peremptory challenges." Annigoni, 96 F.3d at 1144.

Thus, like the defendant in Gray, the jury-selection process in this case defies any attempt to measure harm traditionally. Like Gray, the controversy is animated by the inability to reconstruct the peremptory-challenge process. Moreover, Respondent's exhaustion of peremptory challenges

and his request for an additional peremptory challenge when the opportunity arose defeat any argument that the Government can prove that jury composition would have been the same.

Failing that argument, the Government suggests that Respondent should have asked for an additional peremptory challenge, at the time the for-cause challenge was denied in order to somehow give the district court one last opportunity to cure its error. Brief for the United States, pp. 38-39. The argument is bewildering. The Government does not argue that the district court was on anything less than clear notice of the Respondent's objection to the for-cause denial.

Indeed, immediately following the district court's denial of the for-cause challenge, the district court ordered the defense to strike Gilbert peremptorily if he wished to remove him. J.A. 163. Still hoping to save the challenge, the Defense interrupted and reminded the judge that Gilbert had just indicated a "disregard" for the district court's instructions. J.A. 163. The judge reaffirmed his denial of the for-cause challenge and repeated that a peremptory strike should be used, if Gilbert was to be removed. J.A. 163 (The district court responded that "you know—about him and you can do what you wish with him . . . .") J.A. 163. To have then asked for an additional peremptory challenge would be to ask for something just expressly denied.

Interestingly, the Government cites one lone federal case (along with other state cases) to support a corollary claim that Respondent should have demonstrated dissatisfaction with the ultimate jury panel. Brief for the United States, p. 39 (citing

Frank v. United States, 42 F.2d 623 (9th Cir. 1930)).[11] Even if Frank and the other state court decisions carried weight, in this case Respondent expressly asked for an additional peremptory challenge after the petit jury was called. There could be no clearer expression of dissatisfaction with the panel and a desire for compositional change.

Finally, the Government suggests that Respondent's statement that the exercise of peremptory challenges would permit the addition of more minorities on the panel somehow eviscerated the right to have a peremptory challenge because it would have violated the equal-protection clause. That position is without merit. Clearly, under the Sixth Amendment, defense counsel may make note of the jury's racial composition so as to emphasize that it does not reflect a fair-cross section of the community. U.S. const. amend. VI. Moreover, defense counsel had previously lodged two objections under Batson, *supra* based on race and one had been denied. J.A. 175-177. The defense comments were entirely appropriate.

More importantly, defense counsel merely recited one effect that additional peremptory challenges would have on the panel. J.A. 185-186 (advising the district court of "the *other* advantage" of permitting an additional peremptory challenge (emphasis added)). He did *not* state that he wished to exercise a peremptory challenge in order to remove jurors because of their race. Of course, had the district court allowed the parties an additional peremptory challenge, the Government could have made its own Batson challenge under McCollum, *supra*, which

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[11] Frank, of course, was long ago overruled by the Ninth Circuit, which has repeatedly held that there need not be a showing of prejudice. See, e.g., United States v. Turner, 558 F.2d 535, 538 (9th Cir. 1977); United States v. Brooklier, 685 F.2d 1208, 1223 (9th Cir.), cert. denied, 459 U.S. 1026 (1983).

would have given defense counsel an opportunity to demonstrate the propriety of his strikes.

The Government's claim illustrates the very problem with applying harmless error in this context. The courts cannot and should not have to engage in that kind of wild speculation. It is enough to know that there is a possibility, here almost a certainty, that the jury composition would have been different absent the district court's error.

IV. CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1999